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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of	)	
the Telecommunications Act of 1996	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

CompTel believes that the Commission fulfills the mandate of Section 276 of the Telecommunications Act of 1996 if it establishes an environment which will allow PSPs to recover their costs in installing and maintaining the payphone. The primary way that this should occur should be through market forces which allow PSPs to recover their costs from the entities using and benefitting from a payphone installed at a particular location. Only in call situations where such market forces cannot operate should the Commission develop a mandatory compensation mechanism.

Any compensation mechanism should minimize administrative costs and should place the cost of the system on the entities benefitting from it. CompTel supports a compensation mechanism that uses existing access charge relationships to minimize transaction costs and to facilitate the aggregation of compensation payments by carriers receiving compensable calls. The costs of this system, including the tracking of calls and the rendering of bills for compensation, should be borne by those entities for whom the system is developed -- the PSPs.

Neither the "carrier-pays" nor the "set use fee" system should be adopted for such compensation because both inappropriately rely on the carrier to identify and record calls for which compensation is due. CompTel believes that the ability to identify compensable calls exists within the payphone or within the central office functions providing access for such payphones. It makes no sense to require carriers receiving calls to expend millions of dollars to develop tracking systems when the ability already exists for those who benefit from compensation to record this information.

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Instead, CompTel supports an "access-billed" system where the LECs record necessary information on compensable calls, and submit them to carriers receiving calls from payphones. This system is less costly than other alternatives, avoids imposing millions of unnecessary additional billing transactions per year, and can be implemented without undue delay. In addition, CompTel supports other measures to streamline such billing and the verification of eligible payphone locations.

The Commission must clarify the scope of the compensation obligation under Section 276. For example, although Section 276 permits compensation only for *completed* calls, the *Notice* makes no mention of when a call is considered completed for these purposes. The *Notice* also incorrectly concludes that international calls should be included in this compensation mechanism, when there is absolutely no evidence of Congress' intent to require such compensation nor any discussion of the feasibility of such compensation. The Commission should also set a per-call compensation amount for completed calls at a level which compensates a PSP for its marginal costs incurred for that use of the payphone.

Finally, BOC participation in the payphone presubscription process is not in the public interest at this time. The BOCs maintain bottleneck control over their payphones, which comprise over 80 percent of all payphones available in the United States. At least as long as Section 271 prohibits the BOCs from entering the in-region interLATA market, they should also be prohibited from participating in the payphone presubscription market.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments on the Commission's *Notice of Proposed Rulemaking* in the above-captioned docket.[1]

I. INTRODUCTION

In this rulemaking, the Commission is addressing its regulation of the pay telephone industry in response to Section 276 of the Telecommunications Act of 1996.[2] As is the purpose of the 1996 Act in other areas, Section 276 is intended to foster a more competitive marketplace for payphone calling by eliminating barriers to entry, creating fair opportunities for all providers to compete and neutralizing an incumbent's ability to utilize its entrenched position to harm competition. The Act prohibits the Bell Operating Companies from subsidizing their payphones with exchange or exchange access revenues or from

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[1] FCC 96-254 (rel. June 6, 1996) (hereinafter "Notice").

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

discriminating in favor of their own pay telephones.[3] Central to achieving Congress' goal of a more competitive payphone calling market is its directive to the Commission to "discontinue . . . all intrastate and interstate payphone subsidies" in favor of a plan that ensures payphone service providers ("PSPs") are "fairly compensated for each and every completed intrastate and interstate call using their payphone."[4] Congress envisioned that payphones, regardless of which entity owned them, would recover their costs separate and apart from any telecommunications service revenues the PSP receives for other services. In addition, the Act permits the Commission to allow the BOCs greater powers to participate in a payphone location owners' choice of the presubscribed telecommunications carrier for the phone -- but only if the Commission finds such participation to be in the public interest.

As the principal industry association for competitive providers of telecommunications services, CompTel strongly supports Congress' desire to encourage open and fair payphone competition. Many CompTel members provide operator-assisted calling services specifically designed for "away from home/office" calling needs. These providers contract with PSPs and location owners for the opportunity to serve callers using their payphones and other aggregator telephones. In addition, many of CompTel's members offer calling cards and prepaid calling cards which enable their customers to place calls from locations other than their homes or offices. CompTel members therefore will be directly affected by the rules under consideration here.

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[3] 47 U.S.C. § 276(a).

[4] *Id.*, § 276(b)(1)(A)-(B).

For the reasons explained below, CompTel respectfully recommends that the Commission not mandate compensation where market forces will provide it and develop an equitable, easy to administer system for PSPs to recover their marginal costs in routing other types of payphone traffic to a carrier. Such a system could be achieved by having the LECs track compensable calls and report the results to a neutral third party administrator in a format that allows carriers to verify their compensation obligations. In addition, CompTel opposes allowing the BOCs to participate in the payphone presubscription process at this time. In an environment where the BOCs' control over the local exchange has not diminished and there are reasons for heightened scrutiny if the BOCs receive in-region interLATA authority, BOC participation payphone presubscription is not in the public interest.

II. PAYPHONE COMPENSATION (¶¶ 14-40)

Section 276 of the 1996 Act requires, inter alia, the Commission to develop a plan which ensures PSPs are "fairly compensated for each and every completed intrastate and interstate call using their payphone ..."[5] Congress did not specify a method for carrying out this mandate, but instead vested the Commission with the discretion to adopt rules that provide fair opportunities for PSPs to recover their costs. CompTel respectfully submits that "fair compensation" should be determined by the market wherever possible and, only as a last resort, by FCC-prescribed compensation. The compensation mechanism adopted by the Commission should minimize administrative burdens through use of LEC tracking of

[5] 47 U.S.C. § 276(b)(1)(A).

compensable calls, should place the cost of administering the system upon those who benefit from it, and should compensate PSPs for their marginal costs incurred by compensable calls.

A. Market Forces Should Be Relied Upon to Provide Fair Compensation Whenever Possible (¶¶ 15-17)

CompTel supports the Commission's tentative conclusion that no payphone compensation should be prescribed where market forces operate to compensate PSPs.[6] This approach is consistent with the Act's overall goal of a "pro-competitive, de-regulatory national policy framework" for telecommunications regulation.[7] Moreover, the market is better able than is the Commission to determine what level of compensation is "fair" for the calls in question.

Adequate market forces already operate with respect to 0+ interLATA calls, and with most 0- interLATA calls. These calls are routed to a carrier chosen by the PSP or location owner, and presubscribed carriers generally pay commissions to the provider for every call routed to them from the payphone. Accordingly, the Commission correctly excludes these calls from any required compensation plan.[8]

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[6] *Notice*, ¶ 16.

[7] Joint Explanatory Statement at 1.

[8] Notice, ¶ 16. In addition, some carriers make arrangements to receive "presubscribed" calls by way of an autodialer which routes all "0" calls to the carrier's access code. This arrangement is identical to a presubscription arrangement, and the carrier receiving such calls pays a commission to PSP. Accordingly, "dial around" calls should be excluded from the Commission's prescribed compensation mechanism if the carrier receiving the call pays a commission to the PSP.

In concluding that presubscribed carriers already pay compensation to PSPs "for *all* '0+' calls,"[9] the Commission fails to analyze 0+ intraLATA calls and inter- and intraLATA 0- calls. In most states, intraLATA calls originated on a 0+ basis from public payphones are intercepted by the serving LEC, rather than being routed to the presubscribed IXC. In addition, several states still require 0- calls to be handled by the LEC. In these cases, the LEC generally processes the call, if it is an intraLATA call, or hands it off via 0- transfer to an interLATA carrier of the customer's choice. The two types of calls are not routed to the presubscribed carrier, and the presubscribed carrier does not pay commissions on such traffic. Moreover, the implicit assumption that the LECs pay commissions to payphone premises owners for these calls is not true. In fact, a substantial percentage of premise owners do not receive *any* commissions from the LEC. The proposal, therefore, is discriminatory in that it allows the serving LEC to complete intraLATA calls without paying compensation, but requires all other carriers to pay compensation for the same call.[10]

The Commission has two choices for remedying this discrimination in its compensation proposal. It could either require compensation for these types of 0 dialed calls, or it could break the LEC monopoly on these calls and allow market forces to establish a fair compensation amount. CompTel strongly endorses the latter approach. The most effective method to achieve "fair compensation" would be to encourage competition in 0+ intraLATA calling. The Act clearly endorses intraLATA presubscription as consistent with

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[9] Id. (emphasis added).

[10] An IXC completing an intraLATA call on an access code basis (the only method permitted in most states), must pay compensation for the dial around call, while the LEC making the very same use of the phone (but dialed on a 0+ basis) does not. Since both uses of the telephone create the same costs for the PSP, the Commission must treat both equally.

the public interest by requiring that all PSPs have the right to negotiate with carriers for the processing of intraLATA calls.[11] Opening all intraLATA calling to competition would allow these 0+ calls to be routed to the presubscribed carrier for a telephone, who will, in turn, pay a commission on each such call routed to it. Accordingly, CompTel urges the Commission to direct that all payphones, including Bell Company payphones, send *all* toll traffic to the presubscribed interexchange carrier, whether interLATA or intraLATA in nature. At a minimum, if intraLATA toll calls are not immediately routed to the presubscribed interexchange carrier, the Commission should include 0+ intraLATA and 0- calls in its compensation mechanism.

B. Compensation in All Other Cases Should Be Collected Through a Centralized Mechanism Which Does Not Impose Unnecessary Costs on Carriers Paying Compensation (¶¶ 24-33)

CompTel agrees with the Commission that any compensation mechanism established in this proceeding should meet two goals. First, it should "minimize[] transaction costs" involved in administering the system.[12] Second, it should, to the extent possible, build upon existing procedures and arrangements between industry participants.[13] These goals are especially significant in the present context because there are over 1.85 million payphones potentially eligible for compensation. Even accounting for multiple payphone owners, the number of potential payees numbers over 2,000. Moreover, the amount of compensation that

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[11] *See* 47 U.S.C. § 276(b)(1)(E).

[12] Notice ¶ 28.

[13] *Id.*

a typical interexchange carrier is likely to owe will be tiny. Clearly, the administrative costs of the compensation mechanism could quickly exceed the amount of compensation owed.

The compensation mechanism proposed in the *Notice* -- a "carrier-pays" mechanism -- does not satisfy the Commission's own goals for the efficient administration of compensation to PSPs. First, the proposal ignores the carrier's costs in implementing a "carrier-pays" mechanism. These expenditures include the cost of establishing internal procedures to maintain a roster of eligible PSPs, to verify the PSP's identity and its payphone(s), and to pay compensation on schedule. At present, only the few biggest carriers have developed any compensation procedures, and only AT&T and Sprint have developed per-call tracking for access code calls. Thus, rather than building upon existing procedures, the "carrier-pays" proposal mandates extensive new procedures for nearly every carrier.

Second, the proposal does not minimize administrative costs. The *Notice* concludes that a "carrier-pays" mechanism "would result in less transaction costs because the IXC could aggregate its payments to payphone providers."[14] Any benefits that might be obtained by aggregating payments for individual calls, however, is outweighed by the volume of transactions involved in making payment to individual PSPs. A carrier paying compensation would be required to make a payment to each PSP eligible for compensation, regardless of whether the PSP controlled 1 or 10,000 payphones. Because there are over 1,000 private payphone providers, and an additional 1,000 LECs offering public payphones, each IXC would be required under the *Notice*'s proposal to enter into a transaction with over 2,000 separate entities each time that compensation is due. With over 500 interexchange carriers

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[14] Notice at ¶ 28.

operating today, the *Notice*'s proposed "carrier-pays" system would mandate over 1 million separate transactions each compensation period. The sheer volume of such individual transactions would make the Commission's proposal prohibitively expensive.

Even more fundamentally, the problem with both the "carrier-pays" and the "set use fee" approaches suggested in the *Notice* is that they place the burden on the carrier to track and report the number of compensable calls it receives. The Commission focuses exclusively on whether it is technically possible for carriers to track incoming calls, without ever considering whether such tracking is practical or even appropriate. CompTel submits that for the average carrier, tracking of payphone calls is neither.

The ability to track incoming calls from payphones involves more than determining whether an identifying digit is available for such calls. As explained in the comments submitted in CC Docket 91-35, many carriers, even "large" carriers, do not have a present need for the information that is necessary to identify payphone locations.[15] Indeed, only two carriers today track calls from payphones on a per-call basis, and they do so only for access code calls. Other types of calls originating from payphones are not presently tracked by any carriers in the industry.

As a result, mandatory per-call tracking by carriers receiving compensable calls will require substantial new investments by carriers. To implement this mandate, they will have to modify their call processing software to capture this information, and also will have to develop systems to record, sort, and maintain information on each call routed over their networks. Notably, these modifications will affect the processing of *every* call, even though

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[15] See, e.g. Comments of WorldCom, Inc. and WorldCom Network Services, Inc., at 8-10, CC Docket No. 91-35 (Oct. 10, 1995).

only a tiny percentage of most calls are likely to be originated from payphones. In addition, a carrier must devote personnel and create additional internal processes to associate these calls with individual PSPs, to create "bills" for each PSP entitled to compensation, and to cut and mail checks to each of the approximately 2,000 PSPs. A CompTel member company with more than $100 million in annual revenues has estimated that it would cost over $1 million in initial start-up costs to modify its systems to collect the necessary information and to remit compensation payments under the *Notice*'s proposed system. For other carriers, particularly smaller carriers, the expenses are likely to constitute a significant percentage of a carrier's gross revenues.[16]

Instead, the Commission should require the access provider for the payphone (usually the LEC) to track compensable calls originating from payphones. Since all compensable calls must pass through access facilities, access providers have a nexus with every call for which compensation would be due. CompTel believes that access provides are in the best position to identify each compensable call at the lowest cost. For example, 10XXX and 101XXXX access code calls can be identified by the carrier CIC code associated with these digits. In addition, the overwhelming majority of 1-800 or 950 access code calls could be associated with individual carriers through industry sources or carrier identification codes. Other 800 (and 888 toll-free calls) could be identified by the RespOrg responsible for the

[16] It is not appropriate to impose such a substantial burden -- in addition to the added expense of the compensation payment itself -- on these carriers simply because they "receive the benefit of toll-free calls." Notice, ¶ 31 n. 82. This rationale misinterprets traditional cost causation principles, which would place the burdens of compensation on those who benefit from compensation -- the PSPs.

terminating number. As the Commission recently concluded this method appears to be feasible for at least some LECs.[17]

Once these calls are identified and recorded, LECs (or other access providers) should be required to submit call records to each carrier from whom payment is due. Such submissions should contain sufficient information for the carrier to identify the call, including at a minimum, the date and time of the call, its duration, the originating payphone number, the terminating number, and any billing information associated with the call. This information should be submitted in a format, specified by the carrier responsible for payment, that will allow it to verify the bill against its own completed call records. In this way, carriers would have a meaningful opportunity to confirm their compensation obligations before making payment to the PSP.[18]

The cost of LEC tracking and recording should be borne by the entities benefitting from compensation - the PSPs themselves. This arrangement is consistent with standard billing practices, in which the entity requesting payment -- the PSP -- pays the cost of rendering invoices to the billed party. Recovery of such costs could easily be added to existing billing arrangements between LECs and PSPs, such as in the rate for a payphone connection to the LEC network.

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[17] *Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Restructure its Rates to Establish a Pay Telephone Use Fee Rate Element*, Order, DA 96-268 (rel. Mar. 1, 1996) (*Ameritech/SW Bell Waiver*); *see Notice*, ¶ 31. Moreover, for over 80% of payphones, the LEC is also the PSP, and should have additional information available with which to render bills.

[18] This arrangement also will enable carriers to avoid double paying for calls it receives through the use of autodialers as a substitute for presubscribed. *See Supra* n. 8.

CompTel believes such a system best meets the Commission's goals and minimizes administration costs of a compensation mechanism. CompTel strongly supports additional procedures that will reduce the administrative cost of an "access-billed" system. For example, Comptel supports the mandatory registration of payphones with a central resource, be it the Commission or a billing administrator. Carriers should not have to duplicate each others' efforts to verify each of the approximately 1.85 million payphones currently installed. Carriers also should not run the risk of making multiple payments to separate parties claiming ownership of a payphone. In addition, administrative costs might also be reduced by performing audits or true-ups of the compensation mechanism on a collective basis, rather than individually by each carrier.

C. Only Completed Calls Should Be Compensated

The Notice does not address one important aspect of Congress' mandate -- that PSPs receive compensation only for *completed* intrastate and interstate calls. In today's telecommunications environment, "completed" calls require additional definition.

There are several situations where the Commission should make clear that a call is not completed and no compensation is required. These include:

- Calls to debit card or access code platforms that do not successfully reach the called party,
- Calls where answer supervision is not available, leaving the carrier unable to ascertain call completion, and
- Unanswered calls of all types.

The Commission has expressly addressed these issues in other, similar contexts. For example, the Commission recently examined toll calling services in which a caller first dials an 800 number and then inputs a terminating number after connecting to the carrier's platform.[19] The Commission explained that only one communication is established by such calls because,

> [These] services convey a single communication from the caller to the called party. . . . The record reflects that the user of [such] services intends to make a single call terminating not at a [carrier's] intermediate switch, where the 800 leg of the call's journey ends, but at the telephone line of the called party.[20]

800-originated access code and debit card calls present similar issues. With these types of services, the caller intends to make a single communication -- between the originating payphone and the called party's terminating number. Such a communication is not "completed," therefore, until the caller actually connects to the called party. Indeed, carriers do not bill callers for calls reaching their platforms precisely because such calls are not yet completed. Accordingly, it would be inappropriate to require compensation for 800-originated access code calls or calls to debit card platforms if the calling party does not successfully reach the called party.[21]

Further, the Commission should take this opportunity to clarify that Ameritech's practice of billing carrier for "completed" after 25 seconds is an unreasonable practice.[22] The Commission has long held that a carrier may not automatically assume that calls are

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[19] *Long Distance/USA, Inc. v. Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1634 (1995).

[20] *Id.* at 1638.

[21] Similarly, calls where answer supervision is not available should not be subject to compensation. In these circumstances, carriers have no way of knowing whether a call has been completed, and no way to determine whether compensation is due.

[22] Ameritech Tariff FCC No. 2, Transmittal No. 953 (filed Mar. 5, 1996).

completed based simply on their duration.[23] This policy is based upon an acknowledgement of the practical realities of many calling situations. For example, a call could last for 25 seconds (or longer) simply because a caller lets a telephone ring 10 or more times before hanging up. In addition, for calls to debit card or access code platforms, the set-up time (including the caller's inputting of the terminating number) could last longer than Ameritech's presumptive duration. Accordingly, the Commission should rule that Ameritech's practice is unreasonable, and cannot be relied upon to identify compensable calls under a payphone compensation mechanism.

D. The Commission Should Exclude International Calls (¶ 18)

The Notice recognizes that Section 276(b)(1)(A) of the '96 Telecom Act applies only to "completed intrastate and interstate call using their payphone . . . ." (Notice at ¶ 14.) This language is very clear in its application to *intrastate* and *interstate* calling, and equally clear in its omission of *international* calling.

An "interstate" call has a very precise meaning under the Communications Act, referring to communications originating in one state and terminating in another state.[24] By contrast, international calls are classified as "foreign communications."[25] Congress, in drafting the '96 Telecom Act, understood this difference, and must be presumed to have used

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[23] *See Bill Correctors, Ltd. v. United States Transmission Systems, Inc.*, Mimeo No. 703 (Chief, Com. Car. Bur., 1984).

[24] 47 U.S.C. § 153(e)

[25] *Id*. § 153(f).

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the term "interstate" intentionally.[26] For example, in Section 502 of the '96 Act, Congress regulated the transmission of indecent material in "interstate or *foreign communications.*"[27] Clearly, Congress knew how to apply its regulations to international calls, if that had been its intent. Its decision not to include such calls in Section 276(b)(1)(A) should be given substantial weight.

The statement in the Notice that the Commission can find "no evidence . . . of congressional intent to leave [international] calls uncompensated" [Notice at ¶ 18] is contrary to long-standing methods of statutory interpretation. When a statue uses terms that are clear and unambiguous, an analysis of legislative intent is inappropriate.[28] Further, the Notice improperly reverses the customary statutory inquiry into intent by looking for evidenced intent *not* to require compensation, rather than searching for any evidence of an intent *to require* such compensation in the first place. The total absence of any affirmative evidence of Congress' intent to mandate compensation for international calls strongly weighs against the tentative conclusion advanced in the Notice.

Moreover, the Commission should not resort to its powers under Sections 4(i) and 201(b) of the 1934 Act to prescribe compensation for international calls. Neither of those

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[26] See BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one Section of a statute but omits it in another.") (quoting, *Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994)).

[27] Pub. L. No. 104-104, § 502 (to be codified at 47 U.S.C. § 223(a)) (emphasis added).

[28] See, e.g., Norfolk & Western Ry Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 128 (1991) (Statutory interpretation begins with the language of the statute and "if the intent of Congress is clear, that is the end of the matter.") (quoting, Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 US 837, 842-43 (1984)).

provisions can be fairly read to require compensation for such calls, nor to authorize the Commission to adopt such a mandate.[29]

E. "Fair Compensation" is Determined by a PSP's Marginal Costs (¶¶ 35-40)

As stated above, compensation should be prescribed only for calls where market forces will not adequately compensate PSPs. The amount of compensation in these circumstances, moreover, should be based upon the marginal cost that a PSP incurs as a result of the compensable call. This standard should be established as the standard for determining "fair compensation" for completed calls, and the Commission should set a compensation amount equal to such costs.

CompTel agrees with the Commission's conclusion that a "cost-based" approach is appropriate for determining the amount of compensation.[30] Cost-based surrogates were used to establish compensation in docket 91-35 for access code calls from competitive payphones.[31] Cost-based compensation is more appropriate than other mechanisms such as PSP "opportunity costs" because, as the Commission recognized, compensation is not

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[29] Similarly, the Congress excluded international calling from Section 226 (TOCSIA), defining operator services as "interstate" calls. Thus, no intent to require compensation for international calls may be found in that provision.

[30] *Notice*, ¶ 38.

[31] *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 FCC Rcd 3251, 3256-57 (1992).

intended to allow PSPs to recover monopoly profits it could obtain from funneling all operator-assisted traffic to a single provider.[32]

Not only should the compensation amount be cost-based, but it should be based upon the PSPs' *marginal* costs. The marginal cost standard is endorsed by the Commission on two separate occasions in the *Notice*. As the *Notice* states, "The issue of fair compensation arises only [when] . . . the PSP does not receive any revenue to cover its *marginal cost* in originating the call . . .."[33] In all other cases, the PSP is "fairly compensated" for the cost it incurs in making its payphone available for the call. Accordingly, the Commission should explicitly adopt this standard for all types of calls as the appropriate level at which to compensate PSPs.

The only evidence in the record before the Commission of PSP marginal costs is a cost study submitted by MCI in Docket 91-35.[34] That study estimated that private payphone provider costs are approximately 8.3 cents/call. The Commission should rely this study as the best available evidence in the record of a PSP's marginal cost incurred when its facilities are used to place a compensable call. Therefore, carriers receiving compensable calls from payphones (other than those for which it already pays a commission) should be required to compensate the PSP at 8.3 cents per completed call received.

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[32] *See, id.* at 3255; Notice at ¶ 36.

[33] *Notice* at n. 54; *see also id.* at n. 64 (local coin rates must cover "the marginal cost of the service").

[34] Hatfield Associates, Inc., *Payphone Compensation Cost Analysis* (Oct. 10, 1995), submitted with MCI Comments, CC Docket No. 91-35 (Oct. 10, 1995).

III. BOC ABILITY TO NEGOTIATE WITH PREMISE OWNER FOR INTERLATA CALLS (¶¶ 67-73)

A. Permitting the BOCs to Negotiate with Premise Owners on the Selection of InterLATA Carriers Is Not in the Public Interest

Since the introduction of equal access to public payphones, BOCs have been forbidden from participating in payphone presubscription. The reason for such an exclusion was simple: The BOCs' control over the vast majority of payphones gives them incentives to discriminate or otherwise use their unique market power in favor of certain IXCs.[35] Over the past eight years (and despite the advent of the 1996 Act), nothing has changed to alleviate this concern.

Today, the BOCs remain monopolists with control of approximately 80% of the nation's payphones.[36] Back in 1988, the Department of Justice, Judge Greene and others expressed concerns that the BOCs might use this market power to favor AT&T over its nascent rivals. In today's era of industry consolidation, hastened by the MFJ repeal,[37] the concern is refocused on a BOC's ability to favor either (1) an IXC that permits the BOC to realize all the benefits of being a reseller, or (2) itself, once it clears the competitive checklist for in-region, interLATA entry.[38]

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[35] *See, e.g., United States v. Western Electric Co. Inc.*, 698 F.Supp 348 (D.D.C. 1988).

[36] *Notice* at ¶ 6.

[37] *See e.g.*, "Bell Atlantic and NYNEX Make It Official," *Wall Street Journal*, Apr. 23, 1996, at A4; "Megamergers Shake Two Industries: Communications; Two "Baby Bells" Plan a $24 Billion Deal," *Washington Post*, Apr. 2, 1996, at A1.

[38] See 47 U.S.C. § 271(C)(2)(B).

This adjustment does not, however, change or alleviate the concerns that result from the BOCs' control over the nation's payphones. Such market power creates both opportunities and incentives for anticompetitive conduct. As economic theory suggests and history bears witness, when left unchecked, a monopolist will exercise market power to stifle competition. This result could not run more counter to nor undermine more thoroughly the goals of the 1996 Act.

There is ample evidence in the legislative history of the 1996 Act that Congress suspected that this was the case and that competition would be sacrificed by giving the BOCs the right to participate in payphone presubscription. Although Section 276(b)(1)(D) directs the Commission to

> provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones,[39]

congressional conferees thought it necessary to add the caveat

> *unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest*[.][40]

That Congress added this concluding phrase is highly significant. As the Conference Committee stated, "[t]his modification would allow the Commission, if it determines that it is in the public interest, *__not__ to* allow the BOCs to have the same rights as independent

[39] 47 U.S.C. § 276(b)(1)(D).

[40] *Id.* (emphasis added).

payphone providers in negotiating with the interLATA carriers for their payphones."[41] Because the core concerns that gave rise to premise owner selection of interLATA carriers for BOC payphones remain and indeed are heightened, the FCC must conclude that it is not in the public interest to afford the BOCs these rights at this time.

Indeed, the Commission need only look to the last two weeks to find an example of a BOC's attempt to exploit its control over its payphones to impede competition in the operator service market. Since 1988, the BOCs have been obligated to provide interconnection and signalling for any interexchange carrier submitting a bona fide request to process "1+" coin sent-paid calls originating from BOC payphones.[42] In reliance upon this mandate, a few carriers have devoted substantial resources to obtaining the ability to process these calls, and many coin sent-paid calls today are processed by carriers other than AT&T. On June 21, 1996, however, BellSouth proposed to introduce a new electronic pay station which removes coin sent-paid call processing function from the control of interexchange carriers equipped to process such calls.[43] Instead, what was once a competitive function now will be provided exclusively by BellSouth, with the presubscribed interexchange carrier providing only the transmission functions on such calls. Carriers who have made substantial investments in developing coin sent-paid capabilities will be unable to provide those services from

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[41] Joint Explanatory Statement of the Committee of Conference, at 43 (emphasis in the original).

[42] See United States v. Western Elec. Co., 739 F. Supp. 1, 12-13 (D.D.C. 1990).

[43] BellSouth Telecommunications, Inc., Tariff FCC No. 1, Transmittal No. 354 (Jun. 21, 1996).

BellSouth's new payphones and instead will be required to from BellSouth the functions they previously supplied themselves.

More examples of this type of behavior are likely if the Commission were to allow the BOCs to participate in the selection of interLATA carriers for their payphones. Although the particulars might vary, the BOCs could exercise their near total control of regional payphones to distort and retard competition in interexchange services from their payphones. The BOCs' ability to aggregate payphones in numbers that no other party could approach would ensure their "participation"—to the exclusion of virtually all others.

With such control and bargaining power, the BOCs could demand terms and commissions from IXCs seeking to serve the payphones. By controlling the rates to be charged and the services to be offered, and insisting on a percentage of the gross revenue, the BOCs could use their *de facto* ability to choose the IXC to realize the same benefits as they would receive if they were themselves the IXCs. In short, allowing the BOCs to exercise their market power in the selection of IXCs for their payphones in effect makes them resellers of in-region interLATA services, thus enabling them to enter the in-region, interLATA market prior to satisfying the congressionally mandated Section 271 competitive checklist. Allowing the BOCs to accomplish indirectly what Section 271 directly prohibits them from doing simply is not consistent with the 1996 Act nor the public interest.[44]

Congress explicitly set forth the terms under which the BOCs will be allowed to enter the interLATA market. Because allowing a BOC to participate in the selection of interLATA carriers from its payphones has the same effect as allowing the BOC to provide the service

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[44] 47 U.S.C. § 271.

itself, a BOC's participation in the selection process should be prohibited at least until such time that it satisfies the competitive checklist of Section 271 and is authorized to provide in-region interLATA services. Even then, nothing likely will have taken place to alleviate the core concerns surrounding BOC control of the vast majority of payphones.

It does not follow that it will be in the public interest to allow the BOCs to participate in the selection of interLATA carriers for their payphones even after Section 271 authority is granted. At that time the Commission will have to consider the establishment of substantial safeguards to ensure the BOCs do not unduly favor their own interLATA affiliate. These safeguards will be necessary to protect against potential anticompetitive conduct that clearly could result from the BOCs' effective control of payphone interLATA carrier selection. Among the safeguards the Commission should consider are (1) limiting the BOC's ability to route traffic to any single carrier or any two carriers (this can be accomplished by establishing a maximum percentage of traffic that may be directed to any one carrier), (2) prohibiting the BOC from PIC'ing itself, and (3) limiting the BOCs' ability to aggregate payphones into a single commission agreement.

B. Existing LOAs Are Mutually Binding Contracts

The Commission's conclusion that "Section 276(b)(3) of the Act, which provides that 'nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the [Act],' grandfathers all contracts in existence as of February 8, 1996" is correct.[45] Moreover, CompTel also supports the Commission's

[45] *Notice* at ¶ 73.